

November 20, 2015

Via Electronic Mail (tedder.newton@epa.gov) and Hand-delivery

Mr. Newton Tedder
U.S. EPA, Region I
5 Post Office Square
Suite 100, Mail Code OEP 06-4
Boston, MA 02109-3912

Re: 2013 New Hampshire Small MS4 Draft General Permit

Dear Mr. Tedder:

Conservation Law Foundation (CLF) appreciates the opportunity to further comment on proposed modifications to the above-referenced draft general permit, pertaining to small municipal separate storm sewer systems (MS4s) in New Hampshire, as publicly noticed in the Federal Register on September 1, 2015. CLF submitted comments on prior iterations of this draft permit by letters dated February 20, 2009, July 27, 2010, and August 12, 2013, as well as comments on the proposed modifications by letter dated November 1, 2015. CLF incorporates its prior comments, including all attachments submitted therewith, as if fully set forth herein.

CLF provides the following brief comments, targeted to various comments and arguments raised in joint comments submitted by various MS4 communities (the Town of Amherst, *et al.*) under cover of correspondence dated November 2, 2015.

In its Statement of Basis for Proposed Modifications ("Statement of Basis"), EPA states:

Pollution from urban stormwater runoff is well documented as a leading cause of impairment of freshwater lakes, rivers, and estuaries (US EPA, 2009); (National Research Council, 2008). A number of harmful pollutants are contained in urban stormwater runoff, including the following major constituents: Nutrients (nitrogen and phosphorus), Bacteria/Pathogens, Chloride, Solids, Oil & Grease (Hydrocarbons), and Metals (Center For Watershed Protection, 2003); (US EPA, 1999); (Shaver, et al., 2007); (Lin, 2004); (Schueler, 2011); (Pitt, et al., 2004) (Clark & Pitt, 2012); (National Research Council, 2008). Literature review and analysis of National Stormwater Quality Dataset (NSQD) data of urban stormwater constituents indicates that it can be reasonably assumed that stormwater discharges from urban areas in New England contain bacteria/pathogens, nutrients, chloride, sediments, metals, and oil and grease (hydrocarbons). This is not to say that every grab sample of stormwater will always contain each of the aforementioned stormwater constituents, however, if sufficient data is available for any single urban

stormwater discharge, the average concentrations of bacteria/pathogens, nutrients, chloride, sediments, zinc (metals), and oil and grease (hydrocarbons) will likely be present. When a waterbody is found to be impaired pursuant to Clean Water Act (CWA) Section 303(d) or 305(b) for a particular pollutant, or the receiving water is experiencing an excursion above water quality standards due to the presence of a particular pollutant, it indicates that the waterbody has no assimilative capacity for the pollutant in question. EPA reasonably assumes that urban stormwater discharges from urbanized areas in New England contain bacteria/pathogens, nutrients, chloride, sediments, metals, and oil and grease (hydrocarbons) and finds that MS4 discharges are likely causing or contributing to the excursion above water quality standards when the receiving waterbody impairment is caused by bacteria/pathogens, nutrients, chloride, metals, sediments or oil and grease (hydrocarbons). EPA has determined that it is appropriate to require additional controls on such discharges to protect water quality.

See Statement of Basis at 2-3. CLF agrees that there is ample and robust evidence, based on substantial data and studies, to support EPA's conclusions relative to (1) the pollutants contained in stormwater from urbanized areas, (2) the likelihood of MS4 discharges causing or contributing to waterbody impairments for the above-stated pollutants, and (3) the determination that "it is appropriate to require additional controls on such discharges to protect water quality." *Id.* at 3.

In their joint comments, the Town of Amherst *et al.* ("join commenters") contend that EPA's approach in the draft permit is unlawful on the grounds that it is somehow inconsistent with EPA's response to the July 10, 2013 petition by CLF, Natural Resources Defense Council (NRDC), and American Rivers (AR) seeking regulatory coverage under the Clean Water Act for non-permitted discharges of stormwater from commercial, industrial and institutional sites in New England.¹ Their argument is without merit. In the first instance, the joint commenters mischaracterize EPA's response to the CLF / NRDC / AR petition as a *rejection* when, in fact, EPA concluded that it was neither granting *nor denying* the petition. More importantly, the manner in which EPA addressed the petition is simply inapposite to the manner in which it administers the Small MS4 permit program. Quite to the contrary, whereas there are no jurisdictional determinations at issue in the draft Small MS4 permit program, the CLF / NRDC / AR petition pertained solely to stormwater discharges *not subject to* any NPDES permit program and sought an affirmative determination by EPA to regulate those unregulated discharges through the exercise of its residual designation authority. Attempts to wield EPA's petition determination as a sword in this wholly unrelated matter rings hollow at best.

The joint commenters further suggest that EPA is acting unlawfully through the development and imposition of requirements designed to prevent discharges that cause or contribute to the violation of water quality standards.² This argument, as well, is entirely without merit. The

¹ The CLF / NRDC / AR petition sought the exercise, by EPA, of its so-called residual designation authority, pursuant to which EPA can regulate a discharge of stormwater that is not otherwise regulated under an existing NPDES program if it determine the discharge "contributes to or is a significant contributor of pollutants to waters of the United States." See 33 U.S.C. § 1342(p)(2)(E); 40 C.F.R. § 122.26(a)(1)(v).

² The City of Rochester, NH objects to the draft permit's use of the phrase "cause or contribute," as well as to various other provisions, claiming they exceed the "maximum extent practicable" standard and applicable law. See Comments of City of Rochester (Nov. 2, 2015) at 3-4, 7-8. As discussed below, EPA is not limited to the maximum

Clean Water Act could not be more explicit in the authority it provides EPA in the permitting process relative to municipal stormwater discharges, stating that “[p]ermits for discharges from municipal storm sewers . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, *and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*” See 33 U.S.C. § 1342(p)(3)(B)(iii). (emphasis added). This statutory language, as well as the overarching goals and policy of the Clean Water Act as enumerated by Congress,³ is entirely consistent with, and supportive of, EPA’s development of a permit that requires Small MS4s discharging pollutants of concern to impaired waters to implement more stringent BMPs to protect water quality and ensure the attainment of water quality standards. Indeed, since issuance of the Phase II regulations in 1999, EPA has interpreted the above-quoted statutory language as applying to all MS4s, including Small MS4s,⁴ and has viewed the Small MS4 permitting program as an iterative one designed to attain and maintain water quality standards.⁵ See also *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-1167 (9th Cir. 1999) (affirming ability of EPA to require

extent practicable standard and can impose additional requirements to control pollutants and to attain and maintain water quality standards.

³ See, e.g., 33 U.S.C. § 1251(a) (objective is “to *restore and maintain* the chemical, physical, and biological integrity of the Nation’s waters” (emphasis added); “it is the national goal that the discharge of pollutants into the navigable water be *eliminated* by 1985” (emphasis added); “it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . .”).

⁴ See 64 Fed. Reg. 68722, 68754 (Dec. 8, 1999) (“This section [*i.e.*, 33 U.S.C. § 1342(p)(3)(B)(iii)], also calls for ‘such other provision as the [EPA] Administrator or the State determines appropriate for the control of such pollutants.’ EPA interprets this standard to apply to all MS4s, including both existing regulated (large and medium) MS4s, as well as the small MS4s regulated under today’s rule.”).

⁵ See *id.* at 68753 (“If the program is inadequate to protect water quality, including water quality standards, then the permit will need to be modified to include any more stringent limitations necessary to protect water quality.”). See also *id.* at 68753 - 68754, stating:

As noted, the 1996 Policy describes how permits would implement an iterative process using BMPs, assessment, and refocused BMPs, leading toward attainment of water quality standards. The ultimate goal of the iteration would be for water bodies to support their designated uses. EPA believes this iterative approach is consistent with and implements section 301(b)(1)(C) [of the Clean Water Act], notwithstanding the Ninth Circuit’s interpretation. As an alternative to basing these water quality-based requirements on section 301(b)(1)(C), however, EPA also believes the iterative approach toward attainment of water quality standards represents a reasonable interpretation of CWA section 402(p)(3)(B)(iii). For this reason, today’s rule specifies that the “compliance target” for the design and implementation of municipal storm water control programs is “to reduce pollutants to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the CWA.” The first component, reductions to the MEP, would be realized through implementation of the six minimum measures. The second component, to protect water quality, reflects the overall design objective for municipal programs based on CWA section 402(p)(6). The third component, to implement other applicable water quality requirements of the CWA, recognizes the Agency’s specific determination under CWA section 402(p)(3)(B)(iii) of the need to achieve reasonable further progress toward attainment of water quality standards according to the iterative BMP process, as well as the determination that State or EPA officials who establish TMDLs could allocate waste loads to MS4s, as they would to other point sources.

See also *id.* at 68754 (“Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards. If, after implementing the six minimum control measures there is still water quality impairment associated with discharges from the MS4, after successive permit terms the permittee will need to expand or better tailor its BMPs within the scope of the six minimum control measures for each subsequent permit. EPA envisions that this process may take two to three permit terms. . . . The iterative process described above is intended to be sensitive to water quality concerns.”).

MS4s to control pollutants to ensure strict compliance with state water quality standards MS4s); 40 C.F.R. §§ 122.4(d), 122.34, 122.44(d).

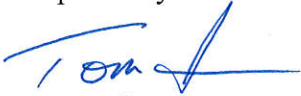
In addition to the above, it is important to note that the current general permit for New Hampshire Small MS4s, issued in 2003, explicitly does not authorize the following discharges: “[d]ischarges prohibited under 40 CFR 122.4,” “[d]ischarges that would cause or contribute to instream exceedance of water quality standards,” and “[d]ischarges of any pollutant into any water for which a Total Maximum Daily Load (TMDL) has been established or approved by the EPA unless the discharge is consistent with the TMDL.” See NPDES General Permit for Storm Water Discharges from Small Municipal Storm Sewer Systems (April, 18 2003), Part I.B.2.(i), (j), (k). It also contains provisions requiring permittees to develop stormwater management programs that address pollutants of concern and “ensure that the discharges will not cause an instream exceedance of the water quality standards.” *Id.* Part I.C.⁶ While apparently objecting to the more prescriptive nature of the draft Small MS4 permit (a prescriptive nature entirely consistent with and justified by the iterative approach identified by EPA as early as the late 1990s), it appears the joint commenters would have EPA strip the Small MS4 general permit of essential requirements intended to ensure attainment of water quality standards and to not authorize discharges that cause or contribute to exceedances of water quality standards. In addition to violating statutory and regulatory provisions pertaining to stormwater management as well as to the overarching objectives of the Clean Water Act and NPDES programs, *see supra*, any such change would violate the Clean Water Act’s anti-backsliding requirements. See 33 U.S.C. §§ 1313(d)(4), 1342(o).

Finally, the joint commenters, as well as the Cities of Rochester and Portsmouth in comments submitted by them individually, contend that New Hampshire’s recently approved 2012 Section 303(d) list of impaired waters is out of date with respect to nitrogen-related impairments for certain waters in the Great Bay estuary. In support of this contention, they reference the proposed de-listing of certain nitrogen-related impairments in the New Hampshire Department of Environmental Services’ (NHDES) draft 2014 Section 303(d) list. Of critical importance, the draft 2014 Section 303(d) list is in the earliest stages of public process and has not been approved by EPA. More importantly, the proposed nitrogen-related de-listings are the product of a settlement agreement resolving litigation between NHDES and certain municipalities, in no way involving EPA, and in no way requiring EPA to approve the proposed de-listings. Quite to the contrary, as part of EPA’s September 24, 2015 approval of NHDES’s 2012 Section 303(d) list, EPA prepared a Technical Support Document assessing in great detail the various total nitrogen-related impairment listings in the Great Bay estuary and concluding – with full knowledge of the above-mentioned settlement agreement, as well as a February 2014 peer review of NHDES’s 2009 numeric nutrient criteria analysis – that “there is substantial information in the record to support the listing of the Great Bay Estuary as not meeting applicable water quality standards and that excess nitrogen concentrations are at least a cause of the State’s aquatic life use impairments in the estuary.” See EPA Review of New Hampshire’s 2012 Section 303(d) List, Attachment A, EPA Technical Support Document at 6-7. As EPA concluded in its Technical Support Document, there is ample evidence of cultural eutrophication in the Great Bay estuary, and of total nitrogen contributing to that adverse condition. See also State of Our Estuaries 2013, Piscataqua Region Estuaries Partnership; Barker, Seth, Eelgrass Distribution in the Great Bay Estuary and Piscataqua River for 2013; Short, Frederick T., Eelgrass Distribution in the Great Bay Estuary for 2013.

⁶ In its Response to Comments on the current Small MS4 General Permit, EPA stated with respect to Part I.C.2: “Part I.C.2 is intended to address the situation where waters have been identified as being impaired by a pollutant which the MS4 will discharge. In such situations, more aggressive storm water strategies would likely be necessary than in the situation where the waters are not impaired.” See EPA Response to Comments at 6.

CLF appreciates the opportunity to submit these comments. And again, we urge EPA to address the matters addressed by CLF in these and prior comments and to proceed expeditiously to the issuance of a final permit.

Respectfully submitted,



Tom Irwin
V.P. and CLF New Hampshire Director

Attachments (hand-delivered):

EPA Technical Support Document (Attachment A) to EPA Review of New Hampshire's 2012 Section 303(d) List

State of Our Estuaries 2013, Piscataqua Region Estuaries Partnership

Barker, Seth, Eelgrass Distribution in the Great Bay Estuary and Piscataqua River for 2013

Short, Frederick T., Eelgrass Distribution in the Great Bay Estuary for 2013